

EDMONDS CITY COUNCIL APPROVED MINUTES

May 29, 2012

The Edmonds City Council meeting was called to order at 5:33 p.m. by Mayor Pro Tem Peterson in the Council Chambers, 250 5th Avenue North, Edmonds. The meeting was opened with the flag salute.

ELECTED OFFICIALS PRESENT

Strom Peterson, Mayor Pro Tem
Lora Petso, Council President Pro Tem*
(*Joined Council at dais at 7:15 p.m.)
Frank Yamamoto, Councilmember
Joan Bloom, Councilmember
Michael Plunkett, Councilmember*
(*Left the Council Meeting at 7:15 p.m.)
Adrienne Fraley-Monillas, Councilmember
Diane Buckshnis, Councilmember

ELECTED OFFICIALS ABSENT

Dave Earling, Mayor

ALSO PRESENT

Alex Springer, Student Representative

STAFF PRESENT

Phil Williams, Public Works Director
Shawn Hunstock, Finance Director
Carl Nelson, CIO
Jerry Shuster, Stormwater Eng. Program Mgr.
Rob English, City Engineer
Jeanie McConnell, Engineering Program, Mgr.
Kernen Lien, Associate Planner
Jeff Taraday, City Attorney
Sandy Chase, City Clerk
Jana Spellman, Senior Executive Council Asst.
Jeannie Dines, Recorder

1. APPROVAL OF AGENDA

(Council President Pro Tem Petso was seated in the audience for Agenda Items 1-4 and joined the Council at the dais for Agenda Items 5-8.)

COUNCILMEMBER PLUNKETT MOVED, SECONDED BY COUNCILMEMBER BUCKSHNIS, TO APPROVE THE AGENDA IN CONTENT AND ORDER. MOTION CARRIED UNANIMOUSLY.

2. APPROVAL OF CONSENT AGENDA ITEMS

Councilmember Bloom requested Item B be removed from the Consent Agenda.

COUNCILMEMBER PLUNKETT MOVED, SECONDED BY COUNCILMEMBER BUCKSHNIS, TO APPROVE THE REMAINDER OF THE CONSENT AGENDA. MOTION CARRIED UNANIMOUSLY. The agenda items approved are as follows:

A. ROLL CALL

ITEM B: APPROVAL OF CITY COUNCIL MEETING MINUTES OF MAY 21, 2012.

Councilmember Bloom referred to a statement on page 6 of the minutes, "Councilmember Bloom summarized wildlife preserves are not critical areas," and stated she never said that. Her conversation with Mr. Lien was trying to figure out if wildlife preserves were critical areas. City Clerk Sandy Chase

suggested preparing a verbatim of that section of the minutes and returning the minutes to the Council for approval at a future meeting.

Councilmember Bloom referred to a statement on page 7 of the minutes, "Mr. Southcote-Want stated Burnstead's burden on remand is to demonstrate compliance with all applicable law. Ms. Morris' advice was this particular tract is outside the Council's scope of review on appeal." Councilmember Bloom pointed out Attorney Carol Morris' summary of Council's jurisdiction on closed record appeal on remand, states in Council jurisdiction #5, "While affirming the applicant's burden on demand to demonstrate compliance with all applicable laws current at the time of vesting." Further, Ms. Morris's worksheet states "the court of appeals remanded the plat PRD for further proceedings before the hearing examiner, limiting the proceedings before the hearing examiner to the issues concerning, a) the drainage plan, b) the perimeter buffer, and c) open space, while affirming the applicant's burden on remand to demonstrate compliance with all applicable laws current at the time of vesting." Councilmember Bloom summarized the statement in the minutes contradicts what Ms. Morris states in her Findings.

Councilmember Bloom referred to a statement on page 19 of the minutes, "Councilmember Bloom asked whether the study was done before or after Hickman Park opened. Ms. McConnell answered the study is dated January 30, 2007. Councilmember Buckshnis advised there was a 2009 update. She referred to pages 283-286. Mr. Taraday pointed out traffic studies do not relate to open space." Councilmember Bloom pointed out pages 283-286 are dated January 30, 2007; there is no 2009 update. She assumed what Councilmember Buckshnis was referring to was projected traffic in 2009. There was no study done after Hickman Park was built.

City Attorney Jeff Taraday explained if someone misspoke but actually made the statement during the hearing, the minutes are accurate. The person speaking may have meant something else or intended to refer to another page but if the recording reflects that the person made that statement, the minutes are accurate not withstanding that there may have been a contrary intention. Councilmember Bloom reiterated there was no traffic study done in 2009 as Councilmember Buckshnis suggested. Councilmember Buckshnis offered to clarify her statement. Mr. Taraday explained this portion of the agenda is for correction of the minutes.

Councilmember Buckshnis referred to page 13 of the minutes and requested "BUCK MOVED" be corrected to "COUNCILMEMBER BUCKSHNIS MOVED."

Councilmember Buckshnis referred to page 19 of the minutes, agreeing that her reference to page 283-286 of the record was information from 2007. There is information in the record regarding a 2009 projected study.

COUNCILMEMBER FRALEY-MONILLAS MOVED, SECONDED BY COUNCILMEMBER YAMAMOTO, TO HAVE A VERBATIM TRANSCRIPT PREPARED OF THE DISCUSSION REFLECTED ON PAGE 6 OF THE MAY 21, 2012 MINUTES. MOTION CARRIED UNANIMOUSLY.

COUNCILMEMBER BUCKSHNIS MOVED, SECONDED BY COUNCILMEMBER PLUNKETT, TO CHANGE "BUCK" TO "COUNCILMEMBER BUCKSHNIS" ON PAGE 13 OF THE MINUTES. MOTION CARRIED UNANIMOUSLY.

Ms. Chase suggested approval of the May 21, 2012 minutes be scheduled on the June 5 agenda. Mr. Taraday commented scheduling approval of the May 21, 2012 minutes on the June 5 agenda could affect the Council's action on the Findings of Fact and Conclusions of Law in Agenda Item 4 because the proposed Findings incorporate the minutes. If approval of the minutes is postponed, it may require approval of the Findings of Fact and Conclusions of Law to be postponed as well. He suggested during

the Finding of Fact and Conclusions of Law agenda item, the Council consider whether the issue Councilmember Bloom raised regarding the minutes was crucial enough that the Council's decision on the Findings of Fact and Conclusions of Law needed to be postponed.

3. **AUDIENCE COMMENTS**

Mayor Pro Tem Peterson cautioned the audience that comments cannot relate to Agenda Item 4.

Ron Steinman, Edmonds, announced Relay for Life of South Snohomish that will be held at Edmonds-Woodway High School on June 9 and 10. Relay for Life is a community event that began in 1985 in Tacoma, Washington, by a local colorectal surgeon, Dr. Gordy Klatt who spent 24 hours circling the track at Baker Stadium on the UPS campus, putting in more than 83 miles. Throughout the night friends paid \$25 to run or walk 30 minutes with him, raising \$27,000 to fight cancer. Today there are over 5200 relay events in the U.S. and it is considered the world's largest fundraising event. South Snohomish Relay for Life will begin at noon on Saturday, June 9 and will continue until 9:00 a.m. Sunday, June 10. He thanked Mayor Earling for agreeing to be the opening speaker. He will be followed by the survivor's ceremony celebrating all cancer survivors as well as their caregivers. The first lap of the relay will be led by survivors, followed by caregivers and family members. All cancer survivors are welcome and he encouraged them to register and attend this free and very emotional ceremony. The luminary ceremony will take place at 10:00 p.m. to honor and remember those who have lost their battle as well as those who are still fighting. The track will be lined with candlelit bags to illuminate the path throughout the rest of the night. Each decorated luminary bag represents one person who battled cancer. There are currently 43 teams signed up and over 400 individuals registered; together they have raised over \$51,000. This is a community event to support cancer survivors, caregivers and family and friends. He thanked their sponsors, Swedish-Edmonds Hospital, Puget Sound Cancer Centers, Fred Meyer, Boulevard Park Place Retirement Community, KRKO and KVO Radio, and Wells Fargo Bank. He offered a special thanks to the Edmonds School District for hosting the community relay event. He encouraged everyone to join a team, start a team or support an existing team. He hoped one day the Edmonds Relay would be the biggest community relay in Western Washington.

Al Rutledge, Edmonds, reported cancer was the local Kiwanis Club's main fundraiser this year; there are donation cans located throughout the City. He encouraged the public to attend the Waterfront Festival on June 1-3. He announced the car show at Top Foods on July 14. Further information is available from Jim Katcher at 206-819-7737 or him at 425-776-7130. Next Mr. Rutledge urged everyone to lock their doors, fearing the crime occurring in Seattle was moving north.

Roger Hertrich, Edmonds, relayed when reviewing old paperwork, he found that a broken train in 1993 on the waterfront blocked ferry loading/unloading and access to the waterfront. That potential, the inability to reach the waterfront due to a disabled train, still exists today. He urged the Council to make access to the waterfront when the tracks are blocked by a train a priority. The potential for coal trains on the tracks increased the importance of this issue.

4. **APPROVAL OF FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR THE CLOSED RECORD REVIEW HELD BY THE CITY COUNCIL ON MAY 15, 2012 AND MAY 21, 2012. PROJECT DESCRIPTION: THE APPLICANT HAS APPLIED FOR A 27-LOT PRELIMINARY PLAT AND PLANNED RESIDENTIAL DEVELOPMENT (PRD) AT 23700 104TH AVE. W., PARCEL NUMBER 27033600304800. APPLICANT: BURNSTEAD CONSTRUCTION COMPANY, FILE NO.: P-2007-17 AND PRD-2007-18 / APPEAL NOS.: APL20120001 - APL20120004. APPELLANTS: LORA PETSO AND COLIN SOUTHCOTE-WANT (APL20120001); IRA SHELTON AND KATHIE LEDGER (APL20120002); CLIFF SANDERLIN AND HEATHER MARKS (APL20120003); DARLENE MILLER, RICHARD MILLER, CONSTANTINOS TAGIOS, AND SOPHIA TAGIOS (APL20120004)**

Mayor Pro Tem Peterson asked if Council members had any ex parte communications to disclose, advising this would include any emails or other communication received from parties of record since May 21.

Councilmember Bloom disclosed an email she sent to City Attorney Jeff Taraday and Mayor Pro Tem Peterson related to her concerns about the representation of the City Council by Attorney Carol Morris. The email was sent on the Sunday following Ms. Morris' representation of the Council on May 15, 2012. She contacted Mayor Pro Tem Peterson due to her concern with a bias on Ms. Morris' part and was concerned with who she represented based on what she (Councilmember Bloom) saw. She was also concerned with the amount of time and therefore money that would be spent using Ms. Morris as an attorney. Mayor Pro Tem Peterson's response was Mr. Taraday would be representing staff and that Mr. Taraday fully supported the conclusions of staff. She recalled Mayor Pro Tem Peterson stated that was in Mr. Taraday's brief but they were unable to find it. Mayor Pro Tem Peterson also said he received an email from Mr. Taraday but he had not forwarded that to her. Councilmember Bloom was concerned with those statements as it appeared there was prejudice; Mr. Taraday was not only the attorney for staff but supported their conclusions. Councilmember Bloom did not recall hearing that from Mr. Taraday in executive session nor she did not recall hearing in executive session that Mr. Taraday would be representing staff.

Councilmember Bloom read her email to Mr. Taraday and Mayor Pro Tem Peterson:

Jeff, I had questions about Carol Morris' role as Council's attorney and just got off the phone with Strom. He conveyed that it was his understanding, either from a conversation with you or an email from you that you advised the Council have separate legal representation because you are representing City staff at the Burnstead hearing. He also stated that you had conveyed to him that you fully support the findings and decisions of the staff based on your reading of the record, discussions with staff, etc. Actually he initially said that you had stated as such in your brief included in the information on the hearing but nothing to that effect is in your statement. I also do not recall you saying that you agreed with staff and would be representing them at the hearing. In the executive session when you advised us to hire counsel, Strom was not present at that executive session. Please reply and reference Edmonds City Code and the RCW that says that as City Attorney you are allowed to represent City staff in a closed record review quasi judicial hearing. It is extremely important that this be clarified before the meeting tonight. Everyone involved in the hearing including Council has a right to know who you legally represent at this hearing.

Councilmember Bloom continued, explaining Mr. Taraday called her and clarified Ms. Morris was representing Council and he was representing staff. She asked Mr. Taraday to clarify that at the meeting.

Mayor Pro Tem Peterson commented disclosures do not usually go into this level of detail unless there is a challenge. Mr. Taraday responded this is not an ex parte communication. The intent of this portion of the agenda item is for Councilmembers to disclose communication they have had with proponents or opponents of the project; that does not include City staff or him. Later in the agenda item, Councilmember Bloom could voice any criticism of the way he handled himself during the proceedings. If there are any ex parte communications disclosed, the appellant and applicant are allowed an opportunity to rebut the substance of the communication.

Councilmember Bloom asked when it would be appropriate for her to talk about the contract that was negotiated with Ms. Morris. Mr. Taraday answered it was up to the chair of the meeting to determine whether that was relevant to the agenda item, Approval of the Findings of Fact and Conclusions of Law. Councilmember Bloom responded it is relevant because Ms. Morris did not represent the Council according to everything she has found and there is a serious conflict of interest that was not revealed to

Council before she was hired. Mayor Pro Tem Peterson explained this is not an opportunity for debate. This is an opportunity for Councilmembers to disclose ex parte communications.

Mayor Pro Tem Peterson asked Councilmember Bloom whether she had any ex parte communications to disclose. Councilmember Bloom said she did not.

Councilmember Yamamoto disclosed he received a letter from the bonding company that Ms. Brown (Burnstead Construction) forwarded to Planner Kernen Lien who forwarded it to Council.

Councilmember Buckshnis disclosed on May 23 Ms. Petso called her and told her not to take offense but she was going to do a public records request against her. She asked Ms. Petso for what reason and Ms. Petso said she felt they could not work together anymore. Councilmember Buckshnis said did not understand that and Ms. Petso said Councilmember Buckshnis did not want to work with her on the Metropolitan Park District which Councilmember Buckshnis denied saying. Ms. Petso then said possibly Councilmember Fraley-Monillas said that.

Councilmember Buckshnis disclosed Mr. Hertrich called her today to say he had not seen the Findings of Fact. She told him she had read them but was uncertain if they were available in writing. Mr. Hertrich then brought up “something about some Spokane thing floating around” and she said she had no idea what he was talking about and they did not talk about it.

Mayor Pro Tem Peterson asked Councilmember Buckshnis if those ex parte communications would influence her decision. Councilmember Buckshnis answered no.

Mayor Pro Tem Peterson asked Councilmember Yamamoto if the ex parte communication he received would influence his decision. Councilmember Yamamoto answered no.

Councilmember Plunkett disclosed on May 23 at approximately 2:30 p.m. Mr. Hertrich called him. He (Councilmember Plunkett) referenced two items, both things in the record, 1) that he voted to uphold the hearing examiner and 2) there is a standard of review that was described in the applicant’s presentation and in Item J of the Findings of Fact. On May 29 at approximately 2:30 p.m., Mr. Hertrich called him and began to talk about the matter; he reminded Mr. Hertrich the Council would be discussing it tonight and they agreed not to discuss it.

Councilmember Plunkett disclosed he had an email from Mayor Pro Tem Peterson regarding scheduling this item. He also received the letter from the bonding company.

Mayor Pro Tem Peterson asked Councilmember Plunkett if those ex parte communications would influence his decision. Councilmember Plunkett answered no.

Councilmember Fraley-Monillas disclosed she received the letter from the bonding company.

Councilmembers Buckshnis stated she also received the bonding letter.

Councilmember Bloom disclosed she also received the bonding letter. Mr. Hertrich called her and talked to her about the Burnstead hearing but she said nothing and told him she could not talk about it.

Mayor Pro Tem Peterson asked Councilmember Bloom if those ex parte contacts would influence her decision. Councilmember Bloom answered no.

Mr. Taraday explained if a Councilmember had a conversation with someone, even a one-way conversation, they needed to disclose the substance of that communication to ensure the other side has an opportunity to rebut. With regard to the bonding letter, he suggested reading the letter into the record and allowing the appellants an opportunity to rebut the substance of the bonding letter. Similarly, there was an email from Mr. Johnston to Mr. Lien today on which Councilmembers were copied. To the extent Councilmembers read that email from Mr. Johnston, that is also an ex parte communication, the substance of which needs to be placed into the record and allow the appellants an opportunity to rebut. It was not enough for Councilmembers to state that they could remain impartial; the substance needs to be disclosed and allow rebuttal of the substance.

Mayor Pro Tem Peterson disclosed he received the letter from the bonding company as well as the email from David Johnston (representing Burnstead). He opened the email but once he saw the subject of the email, he did not read it.

Mr. Taraday commented to the extent that anyone read the email from Mr. Johnston, it should be read into the record and the appellant given an opportunity for rebuttal. If Councilmembers read the letter from the bonding company, it should be read into the record.

Mayor Pro Tem Peterson reported he read the letter from the bonding company. He read the letter into the record:

Dated May 22, 2012

To Kernen Lien, Associate Planner, City of Edmonds

Re: The Woodway Elementary Plat P-2007-17, PRD-2007-18

Dear Mr. Lien:

We have provided surety products for Burnstead Construction Company for many years and we are very familiar with its business. We also provide surety products to many other developers both large and small in the Pacific Northwest. In connection with Burnstead's application for preliminary plat and PRD approval of the above project, we understand that the City of Edmonds is considering that one condition of approval of the application is that Burnstead provide the City with a 5-year maintenance bond on the storm drainage improvements for the plat. This is a highly unusual request and one that we frankly have never been asked to accommodate for a client in the past. In all jurisdictions where our clients do business, the applicable municipal code requires a 2-year maintenance bond which is the maximum maintenance period authorized by state law pursuant to RCW 58.17.120 (copy attached). We also understand the Edmonds City Code states a 2-year maintenance bond is required for a development like this. In reality the time period is often more than two years because the municipality will not release the bond and the developer from the maintenance obligations until it is satisfied maintenance has been done consistent with the requirements of the plat. At this time for several reasons we cannot commit to Burnstead or the City that we would issue a maintenance bond for five years. Some of the reasons include that the final engineering for the improvements have not been completed, we don't know the maintenance conditions and we are not able to complete financial underwriting until the bond is applied for. With that said, while it is certainly an unusual request, because Burnstead is an excellent longtime client of ours and has been successful over the years, we would consider whether we could issue such a bond when the improvements are completed and the maintenance bond is applied for. If you have any questions regarding this letter, please contact the undersigned.

Best Regards,

J. W. Murphree

Branch Manager

Developer Surety and Indemnity Company

Councilmember Fraley-Monillas asked whether disclosure included a public disclosure request that all Councilmembers received. Mr. Taraday answered probably if it was a public disclosure request that relates to this matter. Councilmember Fraley-Monillas answered it was.

Mayor Pro Tem Peterson read an email from City Clerk Sandy Chase:

Dated May 24, 2012 at 10:50 a.m.

Addressed to City Council and Mayor Earling:

Good morning. Below is a request for public records received on 05/24/12 from Lora Petso as a citizen. Please review the request and provide me with copies of any written ex parte communications you received related to the Burnstead closed record review. The written communication could be an email or letter received in paper form. It is important that I receive the records from each of you. If I do a search of all City mail, it is easy to miss a record as I may not have the correct terms or information that would locate all records that respond to this request. If you did not receive any written communications, please respond to this email indicating that you do not have any records. Thank you. Sandy Chase, City Clerk

Mayor Pro Tem Peterson read the email from Ms. Petso:

Dated May 24, 2012 at 8:11 a.m.

Addressed to Kernen Lien, City of Edmonds,

Subject: Ex parte Contacts and Right to Rebut:

Kernen,

I was informed yesterday that the City had failed to fully disclose all ex parte contacts in our appeal of the Burnstead project. While it may be difficult at this point to fully disclose all verbal communications, I request that the City provide prior to entering a final decision the full text of all written communications with decision makers. At this point I am most concerned with emails to and from Councilmember Buckshnis and a communication to all Council that based upon some case in Spokane, Council must give deference to the applicant. I further request at least five days to review the text of the communications, followed by an opportunity to rebut the communications before Council. Lora Petso, as a citizen.

Councilmember Fraley-Monillas referenced a response to this request from Ms. Morris. Mayor Pro Tem Peterson stated communication from an attorney representing the City is not ex parte communication. Mr. Taraday agreed. To the extent that any Councilmember read the email from David Johnston sent today regarding the five year maintenance issue, Mr. Taraday recommended it be read into the record.

Mayor Pro Tem Peterson advised he opened it, saw the subject and closed it without reading it.

Councilmember Buckshnis stated she read the first three, one-sentence paragraphs.

Councilmember Plunkett stated he did not read the letter.

Councilmember Fraley-Monillas stated she received the email but did not open it.

Councilmember Bloom stated she did not remember whether she opened it and briefly scanned it. She did not believe she read it; she certainly did not read every word.

Councilmember Yamamoto stated he did not open the email.

Mr. Taraday read the first three, one-sentence paragraphs that Councilmember Buckshnis referred to:

Dear Mr. Lien and other interested parties:

We have reviewed the proposed Findings of Fact and Conclusions of Law and we have the following comments: Ms. Petso's name is misspelled Laura in several locations on pages 6 and 7. Page 5, second paragraph, the last sentence in this paragraph is confusing; perhaps "not" should be omitted.

Mr. Taraday did not read a longer paragraph that followed in the email because apparently none of the Councilmembers had read it.

Mr. Taraday recommended if there were no other ex parte communications to disclose, rebuttal opportunity should be allowed with regard to the letter from the bonding company and other disclosures. He clarified rebuttal needed to directly rebut the substance of the ex parte communication; it was not an opportunity to speak on whatever subject someone wanted to speak.

Mayor Pro Tem Peterson invited the appellants to rebut the substance of the letter regarding bonding.

Lora Petso, Edmonds, appellant, stated she had not had a chance to review the content of the letter other than when Mayor Pro Tem Peterson read it. She stated if the system is not good enough to be maintenance bonded, it is probably not good enough to provide adequate drainage. With regard to Ms. Chase's disclosure, Ms. Petso stated her belief that the public records request was for all written communications with decision makers, not merely ex parte communications. She asked whether she was allowed to challenge the participation of people she believed have demonstrated bias in this proceeding. For example, last night she timed the presentations from the applicants at 3 minutes but the person speaking in favor of the hearing examiner's decision was allowed 4½ minutes before the red light went on. Last week Councilmember Fraley-Monillas asked a question of all appellants but only Mr. Sanderlin was permitted to answer and she was not. Last week the Council's deliberations were interrupted by Ms. Brown and she was permitted to interject comments into the deliberations and questions but she (Ms. Petso) was not. Ms. Petso summarized these situations show impartiality in administering the hearing and she requested Mayor Pro Tem Peterson step down if he could not be fair.

Mayor Pro Tem Peterson responded he has and will remain impartial. It is his understanding that any concerns beyond that with regard to impartiality would be brought up on appeal. Mr. Taraday explained if someone felt they were biased and should not vote on the adoption of the Findings of Fact and Conclusions, it is not too late to recuse themselves. He asked Mayor Pro Tem Peterson to state whether at any point he felt he was subject to bias or closed minded analysis. Mayor Pro Tem Peterson answered he did not.

Ms. Petso relayed her understanding that she was not allowed to argue, Mayor Pro Tem Peterson remained as a decision-maker. Mr. Taraday responded Mayor Pro Tem Peterson was not stepping down.

Ms. Petso challenged the interference of Ms. Morris last week including her direction that the Council not go issue by issue or the Council may end up denying the plat as well as her comment that she assumed the Council would not deny the plat, and her interruption of Councilmember Bloom's questions regarding the impervious surface change. Ms. Petso stated had the attorney not interrupted, Councilmember Bloom may have made a motion to reinstate the 35% condition. Ms. Petso continued her challenge of Ms. Morris, her diversion of Councilmember Bloom talking about the purpose section of the code that Councilmember Bloom had not referred to, her telling the Council it was not their job to decide what garden space was, and her citation of a drainage code, 18.30.090, that did not exist at the time the application vested.

Ms. Petso also challenged the extent to which Council gave credit to all matters presented since at least one Councilmember has told the public that they were decisively influenced early on in the process by a communication involving a Spokane case that stated the Council had to defer to the developer. She relayed it was suggested to her last week this had been publicly stated by a Councilmember.

Mr. Taraday asked which Councilmember had allegedly made that statement. Ms. Petso responded if they had all been subjected to it, she would not need to disclose which Councilmember. Mr. Taraday explained Ms. Petso could not make a general Appearance of Fairness challenge; she must challenge a particular Councilmember. Ms. Petso challenged any Councilmember whose decision was influenced by the communication regarding the Spokane case.

Councilmember Plunkett pointed out that information was on the record, it is not ex parte communication. Mr. Taraday agreed, explaining Ms. Petso must make Appearance of Fairness challenges specific to a Councilmember based on specific facts and she could make challenges serially if she needed to. Ms. Petso challenged Councilmember Plunkett on that fact.

Councilmember Plunkett asked where the challenge was that he listened to something on the record. Ms. Petso explained the challenge is that he did not give credence to all matters presented since he had already been told early on that he had no choice in the matter based on the Spokane case. Councilmember Plunkett explained early on there was a presentation and he weighed information he heard early on against information he heard later on in reaching his conclusion. Councilmember Plunkett reiterated the information was on the record.

Ms. Petso suggested Councilmember Plunkett identify where in the record that information can be found. Councilmember Plunkett explained it was early on in the applicant's presentation. Mr. Taraday asked Councilmember Plunkett whether he had any ex parte communication with the applicant regarding the matters that Ms. Petso raised. Councilmember Plunkett answered no, none whatsoever. Mr. Taraday asked whether Councilmember Plunkett had prejudged the matter based on the communication that Ms. Petso described. Councilmember Plunkett answered no, what Ms. Petso is describing is a conclusion and attempting to present his conclusion as if it was a predisposition.

David Johnston, Livengood Fitzgerald and Alskog, representing Burnstead Construction, explained Councilmembers have disclosed ex parte communications. The appellants have an opportunity to comment on those disclosures. This is not a forum to start an entirely new challenge to each Councilmember's impartiality.

Mr. Taraday explained the intent of this portion of the agenda item was rebuttal of ex parte communication and Appearance of Fairness challenges based on those ex parte communications.

Mayor Pro Tem Peterson asked if there were any other appellants that wished to challenge any Councilmembers with regard to ex parte communication.

Darlene Miller, Edmonds, appellant, explained her challenge is what she and her husband perceive as the fairness of the process of appealing to the City Council after the privilege of paying several hundred dollars to appeal. Mayor Pro Tem Peterson asked whether she had an Appearance of Fairness challenge regarding an ex parte communication with any of the decision-makers. Ms. Miller answered no.

Mayor Pro Tem Peterson asked whether there were any other challenges by the appellants on the grounds of Appearance of Fairness due to ex parte communication. None were voiced. Mr. Taraday recommended asking the applicant whether they wished to rebut the substance of any ex parte communication, particularly the public records request.

Mr. Johnston stated the applicant does not have any objection or comment with regard to the ex parte communications. He explained ex parte communications are comments that one party makes to a

decision-maker that is not provided to other parties. They did not make any ex parte communications; everything they provided was sent to everyone.

Mayor Pro Tem Peterson asked whether any other members of the applicant team wished to make an Appearance of Fairness challenge due to ex parte communication. None were voiced.

Mr. Taraday recommended the Council now consider the Findings that were drafted by Ms. Morris and revised by him. The Council should have received two versions of the findings, one from Ms. Morris and another from him at approximately 5:00 p.m. today. Because the second version was sent late today, he offered to display the revisions on the screen. Associate Planner Kernen Lien advised the latest version was on the Burnstead webpage. Mayor Pro Tem Peterson asked whether Mr. Taraday's revisions to the Findings were substantive changes to the earlier draft. Mr. Taraday responded some could be considered substantive changes and some were scrivener error corrections.

Mayor Pro Tem Peterson apologized to the Council candidates in the audience who were waiting for the candidate interviews to begin.

Councilmember Plunkett asked whether a party of record in the audience displaying a sign was ex parte communication. Mr. Taraday responded although the applicant's explanation would indicate this is not ex parte communication, his position was any communication that takes place outside the record whether it is communicated to everyone or not is ex parte communication.

Mayor Pro Tem Peterson read a sign held by one of the appellants in the audience:

In America enforcing the lowest possible legal standard is not the proper role for government. Shame on Edmonds Council.

Mr. Taraday offered the applicant an opportunity to rebut that statement. Mr. Johnston responded the applicant has complete confidence the City Council will take that for what it's worth.

Councilmember Bloom stated she has not had an opportunity to read the Findings of Fact and Conclusions of Law because they were received at 10:25 a.m. today and Mr. Taraday's revisions were provided late this afternoon. She was not prepared to vote on the Findings tonight. In addition this agenda item was delaying Council interviews.

Councilmember Bloom voiced a challenge regarding a conflict of interest, Appearance of Fairness, bias and prejudice on the part of the attorney who was hired to represent the City Council. She has questions about the contract that was negotiated with Carol Morris and would like an opportunity to voice her concerns because supposedly Ms. Morris was representing her and every other member of Council.

Councilmember Fraley-Monillas stated she did not have a problem with Ms. Morris' contract. She asked whether the Council should delay its decision on the Findings until the minutes were corrected. Mr. Taraday responded it would be cleaner to wait. He referred to page 11 of the proposed Findings, paragraph I, Oral Argument by Appellants, that states "a detailed and complete summary of the oral argument presented by Appellants has been included in the Minutes of the Edmonds City Council Meeting dated May 15, 2012 and May 21, 2012. The City Council hereby adopts the same by reference as if fully set forth herein." Due to that language, he had some concern about approving the Findings before the minutes were approved. One way to avoid that would be to modify the decision but it would probably be cleaner to delay until the question about the minutes had been resolved.

Councilmember Fraley-Monillas preferred to wait until the minutes were corrected before proceeding.

COUNCILMEMBER FRALEY-MONILLAS MOVED, SECONDED BY COUNCILMEMBER BUCKSHNIS, TO TAKE THIS UP TUESDAY, JUNE 5, 2012, WHEN THE MINUTES HAVE BEEN CORRECTED.

Councilmember Plunkett assumed he should be present. Mr. Taraday responded he did not have an opinion on that. This is not an ordinance; even if there were only five Councilmembers present, the Findings could be passed with a 3-2 vote.

Councilmember Fraley-Monillas offered a friendly amendment to have this as a single agenda item at a special meeting on Monday, June 4, 2012.

Councilmember Plunkett offered to extend his term until June 5, 2012. He asked whether the Council was voting on a new Councilmember at the June 5 meeting. Mayor Pro Tem Peterson asked whether it would be legal for Councilmember Plunkett to vote on June 5 and retire following the vote and then the Council appoint a new Councilmember. Mr. Taraday asked Councilmember Plunkett when his resignation was effective. Councilmember Plunkett explained his last day on the Council is June 4, 2012. The Council is scheduled to appoint a new Councilmember on June 5, 2012. Mr. Taraday did not want to put the City in a position of a legal challenge on the basis of Councilmember Plunkett having resigned and then withdrawing his resignation to vote on this.

Mayor Pro Tem Peterson restated the motion as follows:

TO MOVE THIS ITEM TO A SPECIAL MEETING ON MONDAY, JUNE 4, 2012.

MOTION CARRIED UNANIMOUSLY.

Councilmember Bloom relayed her concerns with undisclosed conflict of interest, Appearance of Fairness, possible bias and prejudice on the part of Carol Morris, all related to the contract for professional services and how it was negotiated. She asked when these concerns would be addressed and requested it be on the agenda prior to the Council reviewing the Findings of Fact. Mr. Taraday responded it was up to the Council President and Council when to take up this issue; he was available to answer questions. Councilmember Bloom requested it be scheduled on the Monday, June 4 agenda prior to approval of the Findings of Fact.

Councilmember Plunkett questioned how the Council could take up Councilmember Bloom's concerns outside the hearing or how her concerns could be confined to only the contract because she also references what occurred in the hearing. He suggested Councilmember Bloom present her concerns when the Council considers the Findings, after Councilmembers make disclosures. Mr. Taraday responded the Council would be fine from a legal standpoint as long as this issue is taken up before the Council votes to approve the Findings of Fact and Conclusions. He cautioned against taking action on the Findings without addressing Councilmember Bloom's concerns. It is up to the Council and Council President to determine when to take up the issue; it could be tonight or on Monday. Councilmember Plunkett reiterated Councilmember Bloom's concerns needed to be part of the Council's deliberations on the Findings.

Councilmember Buckshnis referred to her disclosure of ex parte communication with Ms. Petso when Ms. Petso questioned Ms. Morris' credentials. She recalled the events in executive session differently; Ms. Petso left the room and the Council discussed Ms. Morris' qualifications, amount to be paid, etc. She asked whether that would be considered executive session material that needed to be discussed in executive session. Mr. Taraday explained individual Councilmembers cannot waive the executive session privilege. He stated it was difficult to address Councilmember Bloom's concern when he did not know what her concern was and therefore could not speak to whether Councilmember Bloom could address her concern without releasing executive session discussions.

Councilmember Buckshnis pointed out Councilmembers do not look at all contracts. Councilmember Bloom is questioning a contract that was part of executive session and she questioned how it could be discussed in an open meeting. Mr. Taraday's advice was for the Council to exercise caution in addressing this matter to ensure it is discussed in a manner that does not make public the substance of what was discussed in executive session. He was unable to comment without knowing more about Councilmember Bloom's concerns.

Mayor Pro Tem Peterson requested Ms. Chase schedule an executive session regarding a legal matter on June 4. Mr. Taraday commented he was uncertain the Council could discuss Councilmember Bloom's concerns in executive session.

Councilmember Bloom assured her concerns were not disclosing anything that was discussed in executive session. Mr. Taraday relayed his understanding that Councilmember Bloom had concerns with the contract. The contract itself is a matter of public record; there is not necessarily a waiver of executive session privilege depending on what Councilmember Bloom wanted to talk about.

Councilmember Bloom explained she obtained a copy of the professional services contract today. She was confused by the contract because her understanding was that Ms. Morris was hired as a representative for City Council. Mr. Taraday had clarified during their conversation that he was representing staff and the municipal corporation; Ms. Morris was representing Council and the municipal corporation. The contract references legal services to City Council and yet it is signed by Mayor Earling. Councilmember Bloom questioned how Ms. Morris could be representing the Council when the contract was signed by Mayor Earling rather than a member of the Council. Mr. Taraday answered the scope of work set forth in the contract is clear that Ms. Morris was hired to represent the City Council during and for the limited purposes of the Woodway Elementary plat. Who signed the contract does not change the scope of work.

Councilmember Bloom referred to the Washington State Bar Association requirements, relaying that an attorney when representing a client, in this case the Council is individually a client, not Council as a whole. Mr. Taraday interjected that was not correct. Councilmember Bloom continued, stating informed consent requires that each affected client be aware of relevant circumstances and material and reasonable foreseeable ways that the conflict could have adverse effects on the interests of the client. The conflict of interest that was not disclosed by Ms. Morris was that she formerly worked with Mr. Taraday and that she formerly worked for Ogden Murphy Wallace, the firm that was very involved in the Burnstead matter from the beginning. Councilmember Bloom asserted that was a conflict of interest that was not disclosed to Council. The Bar Association requirements also state that each client has to be informed and in writing consent to hiring the attorney despite the conflict of interest which did not happen.

Mr. Taraday responded there is only one client, the City of Edmonds is the only client he has and the only client Ms. Morris has. There are not six individual clients sitting on the dais. For the purpose of the Rules of Professional Responsibility, the City of Edmonds, the municipal corporation, is his client and also Ms. Morris' client. Therefore he disagreed with Councilmember Bloom's interpretation. Further, the fact that Ms. Morris and he worked in the same law firm, that was disclosed to the Council. Councilmember Bloom stated it was not disclosed; she learned it on the internet.

Mr. Taraday continued, stating even if it was not disclosed to the Council, because neither Ms. Morris nor he are not decision-makers, the Appearance of Fairness Doctrine does not technically apply to them. Further, the fact that they once worked together in no way indicates that Ms. Morris would always agree with him or that he would always agree with her. For example, he revised Ms. Morris' Findings. He concluded he did not see any conflict with Ms. Morris that the client would have needed to waive.

Councilmember Bloom recalled Mr. Taraday told the Council that he and Ms. Morris worked together when he recommended her. What she learned on the internet was that Ms. Morris worked for Ogden Murphy Wallace, which Councilmember Bloom asserted was a conflict of interest according to her reading of the Washington State Bar Association that should have been disclosed to each Councilmember and written consent should have been required acknowledging the conflict. Councilmember Bloom relayed information from the Bar Association that a client who has given consent to a conflict may revoke the consent and like any other client may terminate the lawyer's representation at any time. Mr. Taraday responded Ms. Morris left Ogden Murphy Wallace in 1998; he was unable to see how her being at Ogden Murphy Wallace in 1998, the year he graduated from law school, was a conflict of interest that relates to this matter.

Councilmember Bloom responded she understood that Mr. Taraday was not able to see that but her concern was that it was not revealed and the Council did not have an opportunity to vet her based on the conflict of interest. Councilmember Bloom repeatedly asked what she was missing. Mayor Pro Tem Peterson gaveled Councilmember Bloom, stating Mr. Taraday did not believe there was a conflict of interest. There are five other Councilmembers who comprise the client. He suggested Councilmember Bloom make a motion to rescind Ms. Morris if she wanted the Council to take action on her concerns.

Councilmember Buckshnis referred to her disclosure regarding the ex parte communication she had with Ms. Petso who raised this same exact issue. Councilmember Buckshnis observed there are few municipal attorneys; Ms. Morris' employment at Ogden Murphy Wallace in 1998 had no bearing whatsoever.

Councilmember Bloom referred to the Washington State Bar Association's Rules of Professional Conduct that state a conflict of interest may exist before representation is undertaken in which event the representation must be declined unless the lawyer obtains the informed consent of each client under the conditions of paragraph B. To determine whether a conflict of interest exists, the lawyer should adopt reasonable procedures appropriate for the size and type of firm and practice to determine in both litigation and non-litigation matters the persons and issues involved. Councilmember Bloom asked whether that was saying that Ms. Morris had to disclose to each Councilmember and obtain informed consent from each Councilmember. She reiterated the conflict of interest needed to be revealed and the Council needed to agree in writing that regardless of that conflict in interest, the Council agreed to hire her.

Mr. Taraday explained the Rules of Professional Conduct, beginning with Section 1.7 talk about the conflict of interest general rule. In general, conflicts of interest exist when an attorney represents one client and another client at the same time and those two clients have adverse interests. For example if Ms. Morris was representing the City and Burnstead, that would be a conflict of interest; she wasn't, she was only representing the City. If Ms. Morris had represented the City and Ms. Petso as a citizen in her capacity as an appellant, that would create a conflict of interest; she wasn't. If Ms. Morris represented a former client on the same matter, for example she represented Burnstead in 2007 on this same matter and now was representing the City Council, that would be a former client conflict of interest. That is not the case. He explained he took his professional responsibility very seriously and knew Ms. Morris did as well; he had no basis to believe under his understanding of the Rules of Professional Conduct that Ms. Morris' representation was in any way a conflict of interest. He did not agree with Councilmember Bloom's assertion on that. Because it was not a conflict of interest, all the disclosures do not apply because there was no conflict to disclose.

Councilmember Fraley-Monillas recalled Councilmember Buckshnis had heard some of what Councilmember Bloom stated from Ms. Petso. Councilmember Fraley-Monillas asked Councilmember Bloom whether she heard these questions from Ms. Petso. Councilmember Bloom answered she did not. Councilmember Fraley-Monillas asked Councilmember Bloom whether she had spoken with Ms. Petso regarding this. Councilmember Bloom answered she had not. Councilmember Fraley-Monillas asked whether Councilmember Buckshnis had heard the exact same comments from Ms. Petso. Councilmember

Buckshnis referred to her ex parte communication disclosure regarding Ms. Petso, that she was concerned because Ms. Morris had worked for Ogden Murphy Wallace.

Councilmember Fraley-Monillas asked whether the Council was interested in rescinding Ms. Morris' contract. Mayor Pro Tem Peterson advised he would entertain a motion to rescind Ms. Morris' contract. If not, it is up to the decision-makers.

Councilmember Bloom explained there was more related to this. There were also Appearance of Fairness, prejudgment and bias issues that she observed in the process of the hearing. She did not feel there was a contract to rescind because the Council did not sign the contract. Mayor Pro Tem Peterson asked whether the Council had the authority to sign the contract. City Clerk Sandy Chase answered almost 100% of the time the Council makes a motion authorizing the Mayor to sign the contract. A motion was made at the meeting to approve the contract; contracts are always signed by the Mayor unless he is not present, then the Council President signs in his absence.

Councilmember Bloom asked when the contract was on the Consent Agenda for Council approval. Ms. Chase answered the Council came out of executive session and a motion was made that evening. She would need to review the record to determine the date that occurred. Councilmember Bloom requested Mr. Taraday research how the Council could approve a contract without the opportunity to read through it. Usually contracts are approved on the Consent Agenda and she did not recall seeing this contract on the Consent Agenda. Mr. Taraday explained the Mayor has contracting authority up to \$100,000. The only aspect of this contract that needed City Council approval was the selection of the attorney because the code states selection of legal counsel is made by the City Council. The Council making a motion following executive session gave the Mayor the authority to retain Ms. Morris to do the work that she did.

Councilmember Bloom recommended postponing this discussion to Monday, June 4 prior to approval of Findings of Fact and Conclusions. She was not satisfied and was not getting the answers she felt were necessary. She did not feel she was represented by Ms. Morris. Mayor Pro Tem Peterson advised it was Councilmember Bloom's prerogative to bring up whatever she liked when the Council discussed the Findings of Fact. He suggested she discuss her concerns with the City Attorney to avoid next week's conversation rehashing questions that have already been answered by the City Attorney.

5. **REQUEST FOR ENVIRONMENTAL IMPACT STATEMENT (EIS) TO US ARMY CORPS OF ENGINEERS**

(Council President Pro Tem Petso joined the Council at 7:15 p.m.; Councilmember Plunkett left the meeting at 7:15 p.m.)

Mayor Pro Tem Peterson explained the letter has been signed by a number of municipalities, states and counties throughout the region that would be affected by coal terminals in Washington and Oregon. The letter asked that all communities be part of the EIS and that it not be limited to only the terminals themselves. The EIS would include communities in Wyoming and Montana where mining would be done as well as communities along the rail corridors where coal will be shipped. Issues that an EIS would address include traffic, wildlife habitat and air and water quality.

Council President Pro Tem Petso asked why this was an action item tonight and whether there was a reason to rush this. Mayor Pro Tem Peterson answered the issue of coal terminals process is moving ahead and this is the point at which communities ask to be included in the EIS. Being included in the EIS would ensure Edmonds is considered in any adverse or positive impacts.

COUNCILMEMBER BLOOM MOVED, SECONDED BY COUNCIL PRESIDENT PRO TEM PETSO, TO GIVE AUTHORIZATION TO SIGN THE LETTER TO BRIGADIER GENERAL JOHN MCMAHON, U.S. ARMY CORPS OF ENGINEERS, REQUESTING THAT COMMUNITIES THROUGHOUT THE NORTHWEST BE INCLUDED IN THE ENVIRONMENTAL IMPACT STATEMENT. MOTION CARRIED UNANIMOUSLY.

6. INTERVIEW APPLICANTS FOR THE CITY COUNCIL VACANCY POSITION #1

Mayor Pro Tem Peterson explained that he requested only the applicant to be interviewed to be present in the Council Chambers (the remaining applicants to wait outside the Chambers). He further explained that 20 minutes has been scheduled for each interview; the first two minutes will be an opportunity for the applicant to make an opening statement. This will be followed by questions and answers. If time allows, each applicant will be allowed to make closing comments.

The City Council interviewed the following candidates for City Council vacancy position #1:

- Steve Bernheim
- Randy Hayden
- Natalie Shippen
- Richard Gurtiza
- William Patton
- Harry Gatjens
- Michael Mearns
- Roger Hertrich.

7. COUNCIL COMMENTS

Councilmember Buckshtnis announced that the Waterfront Festival will be held this weekend.

8. ADJOURN

With no further business, the Council meeting was adjourned at 10:12 p.m.